IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANTHONY JAMES MARTYN and CATHERINE MARTYN, husband and wife and the marital community composed thereof,	)	No. 63456-9-I
	)	DIVISION ONE
Appellants,	)	UNPUBLISHED OPINION
v.	)	
RICHARD A. DENT and MARY L. DENT, husband and wife and the marital community comprised thereof,	)	FILED: June 14, 2010
Respondents.	)	

Grosse, J. — When the titles to two parcels of property are held individually by two separate owners who create and record an easement on one parcel to benefit the other parcel and the parcels are later conveyed to separate owners, there is no unity of title and the merger doctrine does not apply to extinguish the easement. Here, a husband and wife each held title individually to two separate parcels, created and recorded an easement relating to those parcels, and sold each parcel to separate owners. Thus, the trial court correctly concluded that when the parcels were later conveyed to the current owners who each hold separate title to a parcel, there was no unity of title and both parcels were subject to the easement. Accordingly, we affirm.

FACTS

On May 16, 1979, Frances and John Middleton purchased two properties now owned by the Martyns and the Dents. After purchasing the properties, Frances quitclaimed one of the properties (parcel A) to her husband John, and John quitclaimed the other property (parcel B) to Frances. In November 2004, the Middletons decided to

sell the properties. They conducted tests on both parcels, which revealed that there were no acceptable septic sites on parcel B. To ensure that both lots would be buildable, they decided to grant a drain field easement over parcel A to benefit parcel B. On November 21, 1984, the Middletons executed a dedication of easement and restrictive covenants (drain field easement), which dedicated an easement for a septic drain field on parcel A for the use and benefit of parcel B.

On November 23, 1984, the Middletons conveyed parcel A to James and Mary Butler. During negotiations for the sale of the property, the Middletons informed the Butlers they intended to transfer the property subject to an easement over parcel A for a septic drain field to benefit parcel B. In exchange, the Middletons agreed to grant the Butlers an easement for utilities across another property they owned (parcel C) so the Butlers could obtain Island County water in the future when they built on parcel A. Additionally, the Middletons agreed to grant the Butlers a view easement over parcel C for the benefit of parcel A.

In September 1998, the Middletons conveyed parcel B to Edward and Cleo Schacker by statutory warranty deed "[subject to]: [e]asements . . . of record." The Schackers installed a septic drain field in the easement area of parcel A, owned at the time by the Butlers. The Butlers never challenged the Schackers' placement of the septic drain field on parcel A.

In March 2008, the Schackers conveyed parcel B to Richard and Mary Dent by statutory warranty deed "[s]ubject [t]o: [e]asements . . . of [r]ecord." In making this purchase, the Dents relied on the recorded easement and the Schackers' representations that the septic drain field was located on parcel A. In May 2002, Mary

Butler conveyed parcel A to Frank and Carol Tichy by statutory warranty deed "[s]ubject to: . . . easements of record."[1] In September 2008, the Tichys conveyed parcel A to Anthony and Catherine Martyn by statutory warranty deed "[s]ubject [t]o: [e]asements . . . of [r]ecord."

The Martyns then challenged the Dents' enforcement of the drain field easement and filed a complaint to quiet title, for ejectment, for trespass, and for damages. Both parties moved for partial summary judgment. The Martyns asserted that the merger doctrine extinguished the easement because both parcel A and parcel B were commonly owned by the Middletons at the time the easement was granted. The trial court denied the Martyns' motion and granted the Dents' motion, dismissing the claims related to the drain field easement.

ANALYSIS

"As a general rule, one cannot have an easement in one's own property."[2] Thus, if the dominant and servient estates of an easement come into common ownership, the ownership interests would merge and the merger would extinguish the easement.[3] But there are exceptions to application of the merger doctrine and our courts have recognized that "the doctrine of merger is disfavored both at law and in equity."[4] The exceptions to the merger rule are as follows:

> [T]he courts will not a compel a merger of estates where the party in whom the two interests are vested does not intend such a merger to take place, or where it would be inimical to the interest of the party in whom the several estates have united, nor will they recognize a claim of merger where to do so would prejudice the rights of innocent third persons.[5]

---

[1] James Butler had passed away by this point.
[2] Radovich v. Nuzhat, 104 Wn. App. 800, 805, 16 P.3d 687 (2001).
[3] 104 Wn. App. at 805.
[4] 104 Wn. App. at 805.
[5] 104 Wn. App. at 805 (quoting Mobley v. Harkings, 14 Wn.2d 276, 282, 128 P.2d 289

The Martyns contend that because both parcel A and parcel B were the community property of the Middletons, the property was subject to common ownership. Thus, the Martyns contend, the merger doctrine requires extinguishment of the easement. The Dents contend that because title to each parcel was held individually by Frances and John Middleton as their separate property, there was no common legal title to the property and therefore no merger.

As the trial court correctly concluded, whether they both had a community property interest in the parcels is irrelevant because once they quitclaimed the separate parcels to each other, they each held title to those properties individually. Additionally, the record indicates that the properties became each spouse's separate property. Frances Middleton's declaration states, "[O]n May 17, 1979, we quitclaimed what is now defendants' property (hereinafter referred to as "parcel B"), to me as my separate property and what is now plaintiffs' property (hereafter referred to as "parcel A"), to John as his separate property." Thus, as the trial court correctly concluded, because legal title to each of the two parcels was held individually by John and Frances Middleton as separate owners, there was no merger and no unity of title preventing creation of the easement.

We further note that even if there was unity of title of parcel A and parcel B at the time of the easement's creation, once parcel A and parcel B were transferred to separate owners, such unity of title ceased and the recorded easement benefitted and burdened those separately owned parcels. Thus, when parcel A was transferred to the Martyns, it was subject to that easement. Indeed, the Martyns' deed clearly states that

---

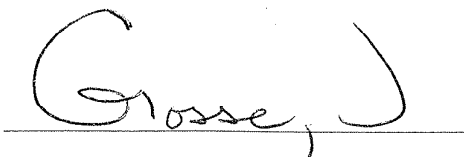
(1942)).

the conveyance of the property was "[s]ubject [t]o: [e]asements . . . of record." Thus, their claim of unity of title cannot somehow apply now to extinguish that easement.

The trial court also correctly concluded that even if the Martyns could establish common ownership, the exceptions to the merger rule apply. The Middletons' intent was clear that the properties would be owned separately; otherwise they would not have quitclaimed them to each other to be held individually as separate property. They also intended to sell them separately, hence the creation of the easement to make parcel B more marketable. Additionally, to apply the merger doctrine would result in prejudice to innocent third parties, the Dents. The Dents' statutory warranty deed expressly states that the conveyance is "[s]ubject [t]o: [e]asements . . . of record," and they relied on the recorded septic drain easement which was in use by their predecessors with no objection by the Martyns' predecessors.

The Dents request reasonable attorney fees and costs incurred in responding to the Martyns' appeal under RAP 18.9(a), contending that it was a frivolous appeal. An appeal is "frivolous" under RAP 18.9 if it raises "no debatable issues" and is "devoid of merit that there [is] no reasonable possibility of reversal."[6] While the appeal was ultimately without merit, we cannot say it was frivolous; there was at least a "debatable issue" about whether the Middletons' ownership of the property was "common." Accordingly, we deny the Dents' request for fees.

We affirm.



[6] State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 905, 969 P.2d 64 (1998) (citations omitted).

WE CONCUR:

Dwyer, C. J. Ellington, J.